

STATE OF MICHIGAN
COURT OF APPEALS

MARY VIRGINIA KIRALY-WALKER,

Plaintiff-Appellant,

v

SAKS DEPARTMENT STORES, INC., and
JOHN ANTONINI,

Defendants-Appellees.

UNPUBLISHED

May 10, 2007

No. 273631

Oakland Circuit Court

LC No. 2005-070843-CZ

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Plaintiff was fired from her position at defendant Saks Department Stores, Inc., in Troy, where defendant John Antonini was a store manager. Plaintiff subsequently obtained employment with Trish McEvoy, a company that assigned its employees to sell cosmetic products directly in department stores. Defendants informed McEvoy that plaintiff was not permitted to work in its Troy store and McEvoy later fired plaintiff. Plaintiff then sued defendants under various theories, including that defendants violated the Bullard-Plawecki Employee Right to Know Act (ERKA), MCL 423.501 *et seq.*, by releasing disciplinary information to plaintiff's new employer without providing notice to plaintiff. The trial court granted defendants' motion for summary disposition and dismissed each of plaintiff's claims. Plaintiff now appeals as of right. We affirm.

Plaintiff's claims stem from an email communication that defendants sent to McEvoy after Saks's employees learned that plaintiff was hired by McEvoy and could be assigned to Saks's store. The email included a statement from Jennifer Gannascoli, the manager of Saks's cosmetics department, telling Joanne Godard, who was plaintiff's supervisor at McEvoy, that "[w]e can not have her [plaintiff] work in this store as she did not leave us on good terms." Antonini thereafter sent Godard an email, which stated, "This was a very bad termination situation for us. I appreciate your support!" Prior to these emails, plaintiff signed a release as part of her application process at McEvoy. The release provides, in relevant part:

CERTIFICATION AND RELEASE I certify that I have read and understand the applicant note on page one of this form and that the answers given by me to the foregoing questions and the statements made by me are complete and true to the best of my knowledge and belief. I understand that any false information, omissions or misrepresentations of facts called for in this application,

whether on this document or not, may result in rejections [sic] of my application or discharge at any time during my employment. I authorize the company and/or its agents, including consumer reporting bureaus, to verify any of this information. *I authorize all former employers, persons, schools, companies and law enforcement authorities to release any information concerning my background and hereby release any said persons, schools, companies and law enforcement authorities from any liability for any damage whatsoever for issuing this information. . . .* [Emphasis added.]

Relying on this release, defendants argued that plaintiff's claims under the ERKA were barred pursuant to MCL 423.506(3)(a). The trial court agreed and dismissed the ERKA claims.

Plaintiff first argues that defendants were barred from relying on the release as a defense because they did not plead it as an affirmative defense. We disagree.

Section 6 of the ERKA, MCL 423.506, provides, in pertinent part:

(1) An employer or former employer shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party, to a party who is not a part of the employer's organization, or to a party who is not a part of a labor organization representing the employee, without written notice as provided in this section.

(2) The written notice to the employee shall be by first-class mail to the employee's last known address, and shall be mailed on or before the day the information is divulged from the personnel record.

(3) This section shall not apply if any of the following occur:

(a) The employee has specifically waived written notice as part of a written, signed employment application with another employer.

Plaintiff alleged that defendants violated MCL 423.506 by sending the email communications to McEvoy without first notifying plaintiff that they were disclosing the information. In their motion for summary disposition, defendants relied on subsection (3)(a) to argue that the release that plaintiff signed with her employment application with McEvoy provided a defense to plaintiff's action. Although defendants acknowledge that they did not specifically plead "release" as an affirmative defense when they filed their answer, they contend that they properly pleaded the defense provided by MCL 423.506(3)(a) by asserting that, as an affirmative defense, "Defendants plead all the privileges and immunities of the Bullard-Plawecki Act."

A party is required to state affirmative defenses in the first responsive pleading or in a motion for summary disposition made before the filing of a responsive pleading. Otherwise, any defense not asserted is waived. *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 241; 635 NW2d 379 (2001); MCR 2.111(F)(2) and (3). Although characterized as a "release," which is an affirmative defense that must be pleaded, MCR 2.111(F)(3)(a), the release signed by plaintiff also constituted an affirmative defense by virtue of MCL 423.506(3)(a). By

asserting in their affirmative defenses that they were relying on any privileges and immunities granted under the ERKA, defendants effectively pleaded the affirmative defense of waiver under MCL 423.506(3)(a). Therefore, defendants did not waive this defense.¹

Next, plaintiff challenges the trial court's decision dismissing plaintiff's other claims. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendants moved for summary disposition under both MCR 2.116(C)(8) and (10), but the trial court did not state under which subrule it was dismissing plaintiff's claims.

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint by the pleadings alone. The motion should be granted only if the claims are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden, supra* at 120.

To the extent that defendants sought summary disposition on the basis of the release, they should have moved for summary disposition under MCR 2.116(C)(7), which is applicable when a claim is barred by a release. See *Xu v Gay*, 257 Mich App 263, 266; 668 NW2d 166 (2003).

When reviewing a motion for summary disposition under MCR 2.116(C)(7), an appellate court accepts all the plaintiff's well-pleaded allegations as true, and construes them most favorably to the plaintiff, unless specifically contradicted by documentary evidence. The court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted, and the motion should be granted only if no factual development could provide a basis for recovery. [*Id.* at 266-267 (citations omitted).]

If summary disposition is granted under the wrong subrule, this Court may consider the motion under the appropriate subrule so long as the existing record permits review. *The Detroit News*,

¹ Furthermore, to the extent that defendants' reliance on any privileges or immunities under the ERKA was insufficient to plead an affirmative defense based on plaintiff's employment application with McEvoy, we agree that amendment to allege this affirmative defense would have been appropriate. Amendment should be freely allowed "when justice so requires." MCR 2.118(A)(2); *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 9-10; 614 NW2d 169 (2000). The record discloses that defendants first learned of plaintiff's employment application with McEvoy during discovery, after they filed their complaint. Additionally, plaintiff has not demonstrated any prejudice occasioned by any delay in amendment. *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 493; 618 NW2d 1 (2000). Under these circumstances, amendment would be justified. See *Meridian Mut Ins Co v Mason-Dixon Lines, Inc (On Remand)*, 242 Mich App 645, 648; 620 NW2d 310 (2000).

Inc v Policemen & Firemen Retirement Sys of Detroit, 252 Mich App 59, 66; 651 NW2d 127 (2002).

Plaintiff argues that the trial court erroneously found that the release in her employment application with McEvoy was applicable to bar her claims. Plaintiff argues that the trial court improperly interpreted the release in her employment application with McEvoy as a general release of liability, and that the scope of the release instead only applied to information requested by McEvoy. We disagree.

The scope of a release is governed by the intent of the parties as expressed in the release. *Collucci v Eklund*, 240 Mich App 654, 658; 613 NW2d 402 (2000). If the release is unambiguous, the parties' intent may be ascertained from the plain and ordinary meaning of the release's language. *Id.* The fact that the parties disagree about the meaning of a release does not alone establish an ambiguity. *Xu, supra* at 272. A contract is considered ambiguous only if its language is susceptible to more than one meaning. *Id.* If the terms are unambiguous, the legal effect of the release is a question of law for the trial court. *Id.*

Plaintiff argues that the release only allowed McEvoy to verify the information she supplied about her previous employers. We disagree. Plaintiff incorrectly argues that the last sentence of the release is restricted by the preceding sentence. The preceding sentence authorizes the company (McEvoy) to verify "any of this information" (in the application), whereas the last sentence authorizes "all former employers" "to release any information." Nothing in the last sentence restricts the scope of the release to only information contained in the employment application. Plaintiff also released "any said persons" or "companies" "from any liability for any damage whatsoever for this information." The terms "all" and "any" are broad in scope and leave no room for exceptions. *Romska v Oppen*, 234 Mich App 512, 515-516; 594 NW2d 853 (1999). Thus, there is no merit to plaintiff's argument that the release is limited to only information of which plaintiff was aware.

Plaintiff also argues that she did not knowingly and fairly sign the release, because she was not aware when she signed it that defendants intended to bar her from returning to their store. A release is valid only if fairly and knowingly made. *Dombrowski v City of Omer*, 199 Mich App 705, 709; 502 NW2d 707 (1993).

"A release is not fairly made and is invalid if (1) the releasor was dazed, in shock, or under the influence of drugs, (2) the nature of the instrument was misrepresented, or (3) there was other fraudulent or overreaching conduct." [*Id.*, quoting *Paterek v 6600, Ltd*, 186 Mich App 445, 448-449; 465 NW2d 342 (1990).]

A release is knowingly made even if it is not labeled a "release" or the terms are not read or are understood differently by the releasor, unless some form of fraud or misrepresentation was used to get the releasor to sign the release. *Xu, supra* at 272-273.

Plaintiff's sole argument in support of her claim that the release was not knowingly signed is that she was unaware that defendants intended to bar her from Saks's Troy store. Even if true, this is not evidence that the release was not knowingly and fairly signed. It is only evidence that plaintiff did not know what defendants would say about her.

The trial court properly determined that the release in plaintiff's employment application broadly applied to authorize the disclosures in this case. Thus, the trial court properly dismissed plaintiff's ERKA claims pursuant to MCL 423.506(3)(a). Further, the scope of the release precluded defendants' liability for any other claims arising out of the information defendants provided to McEvoy regarding plaintiff's employment with Saks. Because plaintiff's claims are predicated on the disclosure of the information authorized by the release, we conclude that the release operates to bar each of plaintiff's remaining claims.

Affirmed.

/s/ Michael R. Smolenski

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra